

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 27 2008

MOLLY DWYER, ACTING CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NAPOLEON FLORES-ARVIZU,

Defendant - Appellant.

No. 06-10461

D.C. No. CR-05-00535-NVW

MEMORANDUM *

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted March 18, 2008**

Before: CANBY, T.G. NELSON and BEA, Circuit Judges.

Napoleon Flores-Arvizu appeals from the 30-month sentence imposed following his guilty-plea conviction for illegal reentry following deportation, in

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate and remand.

Flores-Arvizu contends that the government failed to meet its burden of establishing that his 1997 conviction under California Health & Safety Code § 11379(a) qualifies as a drug trafficking offense for purposes of a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A). We conclude that the documents and judicially noticeable facts presented to the district court at the time of sentencing do not satisfy the government's burden of establishing "clearly and unequivocally" that "the conviction was based on all of the elements of a qualifying predicate offense." *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004). The district court stated that it was relying on a police report allegedly incorporated into Flores-Arvizu's plea agreement to the underlying offense. The record, however, indicates that the police report was not entered into the record in the district court at the time of sentencing. Accordingly, we vacate the sentence and remand.

"The government will have the opportunity at re-sentencing to offer additional judicially-noticeable evidence to support the enhancement." *Navidad-Marcos*, 367 F.3d at 909.

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In his reply brief, Flores-Arvizu moves to strike pages 47-78 of the government's Supplemental Excerpts of Record. Because these documents are not properly part of the record on appeal, this motion is granted without prejudice to the government submitting these documents to the district court upon re-sentencing. *See* Fed R. App. P. 10(a); Ninth Circuit Rule 10-2.

VACATED and REMANDED.